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No. 07-886

2-6-08

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF IOWA,

Petitioner,

vs.

JAMES HOWARD BENTLEY,

Respondent.

On Petition for Writ of *Certiorari* to the Iowa Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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QUESTION PRESENTED

Whether the Iowa Supreme Court correctly decided that the respondent-defendant's right to confront and cross-examine a witness would be violated by allowing an untested videotape of the deceased witness' prior testimonial statement to be used as evidence at trial?

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STATEMENT OF CASE

Clarification of the Question Presented and of the Record

James Bentley, the respondent, has no quarrel with the petitioner's statements regarding opinions below, jurisdiction, and constitutional provision involved at page 1 of the State of Iowa's petition for writ of *certiorari*. Mr. Bentley disagrees with the petitioner's question presented and with some of the claims that the petitioner makes in its statement of case.

The Attorney General for the State of Iowa asks this Court to grant a writ of *certiorari* based on a question that was not ruled on by the Iowa Supreme Court. James Bentley objects to the question as presented by the State of Iowa. S.Ct. Rule 15.2.

The Iowa Supreme Court began its unanimous published opinion with the issue it decided:

> The issue presented in this interlocutory appeal is whether the videotaped statements of J.G., a ten-year old child, are admissible under the Confrontation Clause of the United States Constitution at James Bentley's trial on sexual abuse charges. Because we conclude that J.G.'s statements are testimonial, J.G. is unavailable to testify at trial, and Bentley had no opportunity for cross-examination, we affirm the district court's ruling that the videotaped statements are inadmissible under the Confrontation Clause.

Iowa v. Bentley, 739 N.W.2d 296, 297 (Iowa 2007).

Mr. Bentley's more apt question presented is set out above at page i.

This case involves the State of Iowa's attempt to prosecute James Bentley for alleged sexual abuse of a child. The case is at the pretrial stage. The state

district court granted a defense motion to suppress the alleged child victim's videotaped statement. The Iowa Supreme Court accepted the State's interlocutory appeal. After full briefing and oral argument, the Iowa Supreme Court affirmed the district court's ruling.

The State, at page 2 of its petition, claims that the child protection center, at which the accuser gave her statement, provides "centralized access to services, including medical examinations and psychosocial assessments." The "centralized" nature of the facility also includes providing one central location for all police interrogations of children alleging sexual abuse. The police and medical professionals in Cedar Rapids, Iowa agreed twenty years ago to proceed together, to prevent children from having to go through more than one out-of-court interview. This dual and equal purpose of the child protection center in Cedar Rapids was critical to the Iowa Supreme Court's ruling. The Iowa Supreme Court concluded that "the interview of J.G. was essentially a substitute for police interrogation at the station house." *Iowa v. Bentley*, 739 N.W.2d 296, 299 (Iowa 2007).

The State claims, at page 4 of its petition, that at no point in the interview did the counselor mention "any possibility that Bentley could be punished" for what he allegedly did to J.G. This claim is refuted by the fact that the counselor ended the interview by asking J.G. what should happen to Mr. Bentley, given J.G.'s allegations.

The Attorney General for the State of Iowa, at page 6 of the petition, misstates the record, doing violence to the opinion of the Iowa Supreme Court. The State notes that the hospital counselor "took a break toward the end of the interview" to ask the police and social worker whether she "forgot" to ask any questions. Then, the Attorney General claims that "nothing the counselor asked after the break elicited any further information from J.G." The Iowa Supreme Court's opinion states that "[t]oward the end of the interview, Matuszek told J.G. she was going next door to talk with the police officer and a [social worker] about whether she 'forgot to ask . . . some questions.' When she returned to the interview room, Matuszek asked J.G. additional specific questions about Bentley's conduct." *Iowa v. Bentley*, 739 N.W.2d 296, 300 (Iowa 2007). In fact, J.G. answered the questions requested by the police. The interviewer did elicit additional information.

SUMMARY OF ARGUMENT

The State of Iowa is asking this Court to review a well reasoned and correctly decided case from a lower court so that the State may have guidance on how to get around the Confrontation Clause.

The lower court's unanimous opinion held that a defendant is entitled to suppression of evidence where a child witness' testimony is videotaped, but untested by cross-examination, and the witness is deceased at time of trial. The lower court's opinion detailed significant police involvement during the videotape's creation, resulting in the child's statements being testimonial. The lower court correctly focused on the defendant's rights to confront and cross-examine trial witnesses. The State wants the focus to be from the child's point of view. This would lead to more confusion among lower courts, contrary to the State's claims.

Because the State of Iowa has not and cannot articulate a compelling reason for review in this case, the Court should deny the petition for writ of *certiorari*.

ARGUMENT

Petitioner Cannot Articulate a Compelling Reason to Justify Discretionary Review by this Court because the Lower Court Did Not Err in Deciding This Case

The State of Iowa has not and cannot put forth a compelling reason for this Court to accept discretionary review of the lower court's decision. History shows that this Court accepts cases meant to further significant legal policy considerations. The Court does not generally accept discretionary review to right the wrongs against an individual defendant or alleged victim.

The case of *Iowa v. Bentley* is a straightforward decision by a state supreme court. The defendant's Sixth Amendment right to confront and cross-examine witnesses against him was protected by the state district court's decision. The Iowa Attorney General disagreed with the district court. The State pursued discretionary review by interlocutory appeal. The Iowa Supreme Court accepted the appeal. The parties briefed the case. An *amicus curiae*, supporting the State, also filed a brief. The full Iowa Supreme Court heard oral argument. The court issued a unanimous published opinion several months later.

The State of Iowa requests *certiorari* to the state supreme court. Of primary concern to the State is its claim that this Court's decisions in *Crawford v. Washington*, 541 U.S. 36 (2004),

and *Davis v. Washington*, 547 U.S. ____ , 126 S.Ct. 2266 (2006), have left lower courts in a quandary when statements of unavailable child witnesses are to be offered at trial.

The Court's Rules provide that "review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons." S.Ct. Rule 10. The State seems to rely, without citation, on Rule 10.b to ask for review by this Court. The State argues that the lower court's opinion in *Iowa v. Bentley*, 739 N.W.2d 296 (Iowa 2007), conflicts with that of *Minn. v. Krasky*, 736 N.W.2d 636 (Minn. 2007). A significant distinction, however, is that there was a police presence of which the child was aware in *Bentley*. In contrast, there were no police present for the interview in *Krasky*.

The Iowa Attorney General argues that this Court's decisions in *Crawford* and *Davis* "provide insufficient guidance on how to determine if children's reports are testimonial . . . ." State's Pet., p. 11. The State of Iowa appears to be seeking guidance from this Court on the best way to circumvent the Sixth Amendment confrontation protections provided to citizens accused. This is a wrong-headed request. Such a review would not further the policies relied upon by the Court in *Crawford* and *Davis*.

The State of Iowa does not and cannot claim that the state supreme court misapplied a properly stated rule of law. Even if that were the case, review in this Court is "rarely granted." S.Ct. Rule 10.

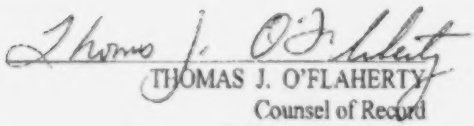
The State concedes that the Iowa Supreme Court's decision held that "admission of J.G.'s statements would violate the Confrontation Clause. In doing so, the Iowa Court found it 'unnecessary' to analyze the purpose of the statements from the child declarant's perspective."

State's Pet., p. 5. Now, the State asks this Court to conduct a review from the State's preferred point of view: that of the child declarant. However, the lower court correctly decided that the paramount focus in a criminal trial is on a citizen's rights to confrontation and cross-examination, not on untested allegations of a deceased child witness.

CONCLUSION

The Court should deny the State of Iowa's petition for writ of *certiorari* for the reasons set out above.

Respectfully submitted,



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